MICHAEL CLIFFORD

v.

GOH BAN HUAT BHD.

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[ORIGINATING SUMMONS NO. 24-536 OF 1990]
15 MAY 1991

CIVIL PROCEDURE: *Jurisdiction of High Court - Originating summons - Industrial Relations Act 1967, s. 20(1) - Employment Act 1955.*

LABOUR LAW: *Expatriate - Relocated family to Malaysia - All expenses paid by employer - Contract of service for 2 years - Probationary period - Extension - Termination - Mandatory injunction for payment of monthly salary - Rare and exceptional - Hardship and hunger.*

CIVIL PROCEDURE: *Mandatory - Termination of employment - Payment of monthly salary - Rare and exceptional - Hardship and hunger.*

The plaintiff M is an expatriate who is an expert in ceramics. The defendant company G is famous for its table wares and other ceramics products.

G's offer of employment, which included very attractive benefits, was accepted by M; the contract of service was a period of 2 years or more with a probationary period of 3 months. G disposed of his own business in Australia and relocated his family to Malaysia.

M alleged that on the expiry of the probationary period, he was informed by the Group General Manager of G that his future was assured with the company. However a month later a M received a termination letter from G.

G contended that they were not satisfied with M's service and that they had extended the probationary period to allow him an opportunity to improve his work; however as there was no improvement, G terminated M's services.

M then filed this originating summons in relation to the termination of his employment. G then applied to strike out M's originating summons on the basis that the High Court did not have jurisdiction to hear this matter. M now applies for an injunction against G ordering G to continue to pay him his monthly salary for the remaining period of his contract.

M had in fact filed a representation under s. 20(1) of the Industrial Relations Act 1967 but as he was in financially dire straits, he filed this summons in the High Court and later withdrew the representation.

The issues for the Court were whether the High Court had jurisdiction to hear M's application and if so, whether a mandatory injunction as requested by M should be granted.

Held:

[1] There is no exclusion clause in the Industrial Relations Act 1967 nor the Employment Act 1955 which deprives M from seeking redress in the High Court.

[2] In the termination letter by G, there was no mention of G's dissatisfaction with M and neither was there any mention of the extension of the probationary period to evaluate M's performance.

[3] There was also no documentary evidence to the effect that G was not satisfied with M's work and neither was there any evidence that M's probation had been extended. One would have thought that G would have communicated his unhappiness with M's service by letter, especially the extension of the probationary period - otherwise the probationary period can even run up to the full period in the contract of service.

[4] As a result of the termination, M has had to vacate the furnished apartment provided by G and his children have had to leave school as G had been paying for the children's schooling. This is a rare and exceptional case where undue hardship and hunger are faced by M and his children and the balance of convenience and hardship are all on M's side - not to grant relief to M would be tantamount to allowing G to have a hold on M and amounts to oppression on M by G. Therefore M should be entitled to the interlocutory mandatory injunction until the disposal of the case after the trial.

[5] In addition, from the affidavit of both parties the Court was satisfied that if this case goes to trial on no other evidence than there is before the Court now, M would be entitled to the present injunction in the same terms as sought by M.

[M's application for mandatory injunction granted]

Case referred to:
Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors. [1981] 1 MLJ 218

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)

For the plaintiff - Jayakumar Iyadorai; M/s. Zailan & Co., Seremban
For the defendant - Thavalingam Thavarajah; M/s. Shearn Delamore & Co.

JUDGMENT

Mustapha Hussain J:

Both applications are taken at the same time.

The plaintiff is an Englishman residing in Australia. He is an expert in ceramics having world-wide experience. He had a ceramics factory in Australia before coming to Malaysia. He is married with four children.

The defendant is a well-known company incorporated and based in Kuala Lumpur and famous for its table wares and other ceramics products.

The plaintiff in the early part of 1990 paid a visit to defendant's company and factory when both the plaintiff and the defendant were impressed with each other. So much so, that the defendant offered the plaintiff an executive position in its table ware department - (see defendant's letter of offer of appointment dated 20 June 1990, together with many attractive terms and conditions).

The plaintiff replied accepting the offer but suggested some changes (see plaintiff's letter dated 22 June 1990).

The defendant replied reiterating the terms and conditions and pointed out that the break-up of the package would be comfortable to the plaintiff and the break-up of the package was specially designed to provide tax free benefits. Membership of some exclusive clubs was also offered. (see defendant's letter in reply dated 25 June 1990, which include a phrase "looking forward to **plaintiff coming on board with us**".

The plaintiff then agreed and sold off his ceramics factory in Australia and planned to bring his wife and children to school them in Kuala Lumpur. The school expenses were included in the contract.

The salary, one cannot help to note, is RM7,000 per month, (much higher than the pay of a Judge of the High Court - pardon the straying) a housing allowance of RM1,500 per month, educational allowance for the children, free telephone and a car. A return trip to Australia, is also included. Plaintiff started work with the defendant company on 1 July 1990.

The contract of service was for two years duration with a probationary period of three months. Everybody was happy - like all good things in this world, the happy relationship came to an end before the agreed two year life span. These are the undisputed facts that can be gathered from the affidavits and submissions of the parties.

According to the plaintiff, at the end of the three months probationary period, on 15 October 1990, (plaintiff started work on 1 July 1990) the plaintiff met the group general manager and plaintiff had enquired about his future with defendant company and was assured of a long service with defendant company. On this representation the plaintiff had finalised the sale of his factory in Australia and brought his family to Kuala Lumpur, and three of his children were placed in the Garden School, Kuala Lumpur. The defendant too applied for the work permit.

However, about a month or so later, the plaintiff was given a letter dated 14 November 1990, stating that the plaintiff's services were no longer desired and that the contract of employment will be terminated at the expiration of 30 days from that date (see defendant company's letter of determination dated 14 November 1990).

The defendant by letter dated 13 December 1990, requested the plaintiff for the return of the car, to vacate the residential premises occupied by the plaintiff and to instruct the Garden International School (where his three children are schooling) to refund the deposit paid by the defendant for the children's schooling.

According to the affidavit filed by the defendant's Group General Manager, the defendant was not satisfied with the services of the plaintiff who did not reach the standards expected and that the defendant had informed the plaintiff that his probationary period was extended, to give the plaintiff the opportunity of improving his service. Even after the extended period of probation, the plaintiff had still not shown any improvement, hence the termination of contract of employment.

The rest of the defendant's affidavit raises the question of jurisdiction of this Court to hear the Summons.

Taking the defendant's application (Encl. 4) to strike out the plaintiff's originating summons first, as it is the horse so to speak (the plaintiff's application being the cart).

The plaintiff had filed a representation under s. 20(1) of the Industrial Relations Act 1967 and as the relief was not forthcoming and he was in dire straits without money, and had to vacate the residential premises, return the company car and get the children's schooling fees back to the defendant, he had decided to file this Summons in the High Court. And he chose the High Court at Seremban where his Counsel said, he would get an early hearing. To the credit of the Seremban High Court, this is true notwithstanding the Seremban High Court is also logged with many cases (one does not wish to resort to any musical instrument - as these are bare facts backed up by some excellent track records).

Some time on 7 January 1991, the plaintiff wrote to the Industrial Relations Officer to withdraw the representation, after he had filed this originating summons on 24 December 1990.

The question for this Court to decide, on defendant's application to strike out the plaintiff's originating summons, is whether this High Court can entertain plaintiff's application.

Looking at the Industrial Relations Act 1967, there is provision for making representations under s. 20(1).

The plaintiff can also make use of the Employment Act 1955.

There is no exclusion clause in both the Industrial Relations Act and the Employment Act to deprive the plaintiff from seeking redress in High Court. Neither *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors.* [1981] 1 MLJ 218 prohibited a dismissed employee from going to the High Court to seek redress.

It is also the defendant's contention that since there are disputed facts (details of contract which have not been controverted by either party) the application should be by way of Writ and not by originating summons. This, in the opinion of this Court is not fatal as an originating summons can be converted into a Writ of Summons (as indeed prayed for by the defendant's Counsel).

It is therefore clear this High Court has the jurisdiction to hear the originating summons herein. Thus, the defendant's application to strike out the originating summons is dismissed.

Now, to the reliefs sought by the plaintiff in the originating summons.

We must not forget that the plaintiff acting on the presentation given so glowingly, had sold off his factory in Australia. He had taken his whole family to Kuala Lumpur and placed three of his children in school on fees paid by the defendant. He is in dire straits, according to his Counsel, he is living on the charity of his friends. He had to vacate the furnished apartment provided by the defendant and where is he going to stay? His children had to leave school. He therefore applies for an injunction ordering that the defendant continues to pay him the monthly salary for the next 18 months, the remaining period of the two years, that the defendant shall also continue to pay him the monthly rent allowance, educational allowance for his three children and provide him a car and telephone - all these for the remaining period of the two years.

From the affidavits before the Court, there is indeed a serious question to be tried. From the affidavit of the plaintiff - para. 13 of his affidavit, on 15 October 1990, - after the three months' probationary period, there was a discussion in the bilik lembaga between the plaintiff and the group general manager Encik Tan Ah Cheun, Encik Ian Long and Encik Vernarn Pereira. Plaintiff's "future with the company was assured for a long time to come" by the defendant.

From the defendant's affidavit, the Group General Manager had said that the company was not satisfied with the plaintiff's work and had given an extension of the plaintiff's probation, but then the defendant did not enclose documentary evidence to that effect.

Surely one would have thought a reputable company, would communicate its unhappiness with the employee's service to be by letter, especially the extension of the probationary period. Otherwise the probationary period can even run up to two years, the full period of service.

Again, in the notice of termination, there is no mention at all of dissatisfaction on the part of the defendant company and no mention at all of the probation. In fact both the plaintiff and the defendant (see defendant's affidavit para. 3) talked about **"untuk tempoh tetap selama dua tahun".**

It is only in very rare cases where example undue hardship and hunger are faced by the plaintiff and his three children, that this Court will order an interlocutory mandatory injunction until the disposal of the case after a trial - (see *Harold Stephen & Co. Ltd. & Ors. v. Post Office*).

Therefore the plaintiff's application in terms of paras. 1 and 4 are allowed until disposal of this suit.

It is further ordered that the plaintiff do file a writ with statement of claim within two weeks from today and the defendant to file its defence within two weeks of service of the writ and statement of claim, instead of converting the present originating summons and affidavits as it would be cumbersome. The originating summons to remain and be amalgamated with the writ. Costs in the cause.

The Court is fully aware that by granting this mandatory injunction it would tantamount to the plaintiff getting his usual salary without working. As stated earlier, this is a very rare and exceptional case which requires a rare and exceptional remedy. Moreover from the affidavits of both the plaintiff and the defendant, this Court is satisfied (though not necessary to grant an interlocutory injunction) that if this case goes to trial on no other evidence (if indeed there is, surely the defendant would have so averred in its affidavit) then there is before the Court now, the plaintiff would be entitled to the present injunction in the same terms as sought by the plaintiff now "tetap untuk dua tahun" or the balance of the two years.

One must not put aside the plight of the plaintiff and his three children who had come from far away to a foreign country and to be left stranded without a cent. The balance of convenience, the hardship are all on the side of the plaintiff.

Just imagine a senior lawyer in a famous legal firm in Kuala Lumpur doing very well. He is offered a junior partnership with a guaranteed salary of treble what he is now getting plus some excellent fringe benefits, in a legal firm in Lagos. He gives up his practice in Kuala Lumpur, brings his wife and family to Nigeria and after a few months, his service are terminated. He, his wife and children are left stranded in Nigeria, without any money. Can one expect him to wander around in Lagos with his family for another two or three years waiting for his case to be heard and disposed of finally?

Not to grant relief to the plaintiff would tantamount to allowing the defendant to have a hold and oppression on the plaintiff by the defendant.

Also found at [1991] 2 CLJ 1384